

Raymond S. Hartman, Ph.D. Confidential - Attorneys' Eyes Only
AM Session Boston, MA

October 7, 2004

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1 THE UNITED STATES DISTRICT COURT
2 FOR THE DISTRICT OF MASSACHUSETTS
MDL DOCKET NO. 01CV12257-PBS

3

4 *****

IN RE: PHARMACEUTICAL
INDUSTRY AVERAGE WHOLESALE
PRICE LITIGATION

7 THIS DOCUMENT RELATES TO:
8 ALL ACTIONS

9 C O N F I D E N T I A L
10 VOLUME: I

11 DEPOSITION of RAYMOND S. HARTMAN, Ph.D., a
witness called on behalf of the Defendants
12 pursuant to the Federal Rules of Civil
13 Procedure, before Judith McGovern
14 Williams, Certified Shorthand Reporter,
15 Registered Professional Reporter,
16 Certified Realtime Reporter, and Notary
17 Public in and for the Commonwealth of
18 Massachusetts, at the offices of Ropes &
19 Gray, One International Place, Boston,
20 Massachusetts 02110, on Thursday,
21 October 7, 2004, commencing at 10:16 a.m.

22

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1 APPEARANCES:

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21

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P R O C E E D I N G S

- - -

RAYMOND S. HARTMAN, first having
been duly sworn, testified as follows in
answer to direct examination by
MR. EDWARDS:

- - -

- Q. State your name, please.
- A. Raymond S. Hartman.
- Q. What is your address?
- A. My business address is Greylock McKinnon
Associates, One Memorial Drive, Cambridge,
Mass. 02142.
- Q. What is your home address?
- A. 52 Greylock Road, Newton, Massachusetts
02465.
- Q. And by whom are you employed?
- A. I am self-employed, but I work with
Greylock McKinnon Associates and with a
variety of other firms.
- Q. Who owns Greylock McKinnon & Associates?
- A. I do.

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1 Q. Anybody else?

2 A. No.

3 Q. What have you been retained to do in this
4 case?

5 A. I was retained by counsel to the
6 plaintiffs of the class in this case to
7 review the Complaint and the allegations
8 and to render an opinion if those
9 allegations were to be true whether there
10 would have been causation and impact,
11 classwide impact, injury, and damages, and
12 whether the extent of those damages could
13 be measured by standard formulaic
14 methodologies used by economists.

15 Q. Is that the extent of your retention in
16 connection with this case?

17 A. I would say broadly speaking that to date
18 has been what I have been asked to do. I
19 may be asked to do other things.

20 Q. Do you have any idea what you may be asked
21 to do?

22 A. No.

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1 disagree with that, if that's what you are
2 going to turn to.

3 The -- I haven't read closely
4 enough his opinions as to how it differs,
5 the extent to which it differs, but it is
6 going to differ across classes of trade.
7 I am -- I am taking the average of those
8 averages across classes of trade. I am
9 taking an average for all units sold,
10 which summarizes again the average of the
11 averages, and I'm relating the -- I am
12 taking that as a measure of a real
13 transaction price, and estimating a WAC --
14 a -- I am sorry -- a but-for ASP related
15 to that. And so the application, there is
16 not to be multiple AWP's. There is going
17 to be an AWP as a signal for the average
18 ASP, and then we know that ASPs will vary
19 among classes of trade.

20 Q. Your basic approach, as I understand it,
21 is to compare actual spreads to but-for
22 spreads to determine whether there was

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1 injury? Is that correct?

2 A. The -- briefly put, that is correct.

3 Q. And injury is another way of saying
4 causation? Is that correct?

5 A. Causation and impact are classwide.
6 Injury is the result of that impact or
7 causation.

8 Q. Two sides of the same coin?

9 A. Well, I -- it's --

10 Q. If there is no causation, you wouldn't
11 have injury? Right?

12 A. Well, if there is no allegations of any
13 kind of violations and there was no
14 illegality, you would have no impact or no
15 injury. So I agree with that.

16 Q. Now the but-for spread in your analysis
17 would be the difference between ASP and
18 the but-for AWP? Is that correct?

19 A. The measure of the but-for spread would be
20 based upon the -- a relationship to ASP,
21 as -- as expected, reasonably expected, by
22 the information available. If we're

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1 talking about efficient markets the --
2 what information was available to people
3 generally, the -- it was -- the -- that is
4 the relationship for the but-for spread,
5 the but-for relationship, between AWP and
6 ASP.

7 Q. And the way you calculate the but-for
8 spread is you develop what you call an
9 expectation yardstick and you apply that
10 to the ASP to arrive at a but-for AWP? Is
11 that fair?

12 A. In the illustrative presentation in my
13 declaration, that is true. In the actual
14 damage analysis, I will do more to
15 quantify what -- what the but-for spread
16 is for drugs or for these drug
17 manufacturers during that period of time
18 not subject to the allegations or for
19 drugs and manufacturers during the class
20 period not subject to the allegations and
21 any other studies that are available.

22 Q. And I believe you testified a moment ago

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1 that the ASP that you use in your
2 formulaic methodology is an ASP that cuts
3 across customer classes?

4 A. For the purposes of what I have done here
5 in this illustration, it is, yes. It is
6 the ASP over all.

7 Q. And that is not a proper way to do it, is
8 it?

9 MR. SOBOL: Objection to the
10 form.

11 Q. I mean don't you have doubts about
12 applying that methodology?

13 A. No.

14 Q. In other words, what you are saying is if
15 a pharmacy is paying \$20 and a hospital is
16 paying \$10, then you would calculate an
17 ASP of \$15 even though the class members
18 are purchasing drugs from pharmacies, not
19 hospitals? Is that what you're doing
20 here?

21 A. Could you repeat the question?

22 (The pending question was then

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AFTERNOON SESSION

(RAYMOND S. HARTMAN, Resumed.)

DIRECT EXAMINATION, Continued

BY MR. EDWARDS:

Q. Before we left off we were talking about your methodology, and I believe in your declaration you state that you intend to calculate but-for spreads by using yardsticks based on market expectations?

A. Based on market results that prevailed and informed consumer expectations, third-party payer expectations absent the A to BP scheme during periods of time for drugs that were not subject to that.

Q. You have calculated yardsticks for market expectations? Better way of putting it.

A. Are you asking whether I have or whether I will?

Q. Well, I thought you had already done it.

A. Well, I've done some illustrative versions

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1 of the kinds of information that one would
2 use, but I wouldn't say those are the final
3 yardsticks. As I've said explicitly
4 therein, that they would need to be refined
5 through 30(b)(6) depositions and talking to
6 the people, a variety of people to help
7 clarify what those expectations were.

8 Q. Are you saying that it's doubtful that
9 you'll use any of these yardsticks at trial?

10 A. It's there -- they appear in my declaration.
11 They may be the final yardsticks that I do
12 rely on, but I'm certainly going to refine
13 them as best I can with whatever discovery
14 materials become available.

15 Q. And your yardstick spreads reflect industry
16 expectations regarding price ratios and
17 relationships absent operation of the AWP
18 scheme; is that correct?

19 A. They will.

20 (Discussion off the record.)

21 Q. Why don't you take a look at Paragraph 21 of
22 your declaration.

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1 (Witness reviews document.)

2 MR. EDWARDS: Will the person who
3 just got on the phone identify themselves,
4 please?

5 MR. PALERMO: Yeah. It's Chris
6 Palermo for Defendant Day.

7 MR. EDWARDS: Okay.

8 A. I've looked at that paragraph.

9 Q. As I understand it, you intend to develop
10 these yardsticks by using survey information
11 and by comparing AWP's and ASP's for drugs
12 unaffected by the scheme; is that correct?
13 Or the alleged scheme, I should say.

14 A. I'm going to be using that and other --
15 whatever other information helps me inform
16 my yardsticks.

17 Q. Well, are there other devices that you're
18 presently aware of that you intend to use
19 for this purpose?

20 A. Other devices? I'm not quite sure I
21 understand what you mean by that.

22 Q. Well, other methods. I mean, you've

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1 mentioned two things in your declaration,

2 survey information --

3 A. Uh-huh.

4 Q. -- and comparisons, drugs affected by the

5 scheme to drugs not affected by the

6 scheme --

7 A. Right.

8 Q. -- correct?

9 A. Right.

10 Q. Is there anything else that you've thought

11 of at this point?

12 A. I mention in Paragraph 29, in the bottom

13 paragraph of Page 21, as I've introduced the

14 notion of the yardsticks and discussed what

15 I have put together to date for this

16 illustration, I say, "Of course, finally

17 yardstick spreads to be used to determine

18 injury and damages during the damages phase

19 would take these yardsticks as points of

20 departure and refine them through 30(b)(6)

21 depositions regarding the date provided by

22 drug manufacturers and appropriate

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1 personnel, third-party payers."

2 So I plan to do my own survey work to
3 the extent that I can and my own discovery
4 work with people whose expectations we're
5 talking about.

6 Q. Well, have you identified at this point any
7 drugs that were not affected by the alleged
8 scheme?

9 A. The alleged scheme and the class period
10 begin in 1991, so any drugs prior to that
11 period would be candidates for an
12 examination. As to particular manufacturers
13 that are not listed, I've yet to really look
14 closely on who those manufacturers might be
15 and what the drugs may be, but I plan to do
16 that.

17 Q. So the answer to my question is no, you have
18 not identified any drugs or manufacturers
19 unaffected by the alleged scheme?

20 A. No. My answer is yes. I said all of the
21 manufacturers here prior to the time of the
22 alleged scheme, the class period beginning

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1 January '91 I will look at the defendants'
2 data to the extent that it's available in
3 the '80s.

4 Q. And so if that data shows that spreads prior
5 to 1991, in fact, were larger than spreads
6 after 1991, then there has been no impact?

7 A. I have -- I've got to look at all the
8 information that is available to me and draw
9 my conclusions of what the appropriate
10 yardsticks will be.

11 Q. I take it what you're saying is that you
12 don't think you'll be able to identify any
13 comparables for the class period?

14 A. That's not true.

15 Q. Okay.

16 A. I haven't tried yet.

17 Q. Is it the case that the drugs you would use
18 for that sort of a comparison, a comparison
19 within the class period, would have to be
20 drugs manufactured by companies other than
21 the defendants in this case?

22 A. The selection of the manufacturers and the

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1 selections of the drugs will be based on
2 evidence that I have -- I assume is
3 forthcoming as to the scheme itself and how
4 the scheme was implemented and which I've
5 been asked to accept those allegations. And
6 so that it is my understanding there's going
7 to be evidence about which drugs and which
8 manufacturers from whence I can make some
9 judgment of whether there are some
10 manufacturers or there are some drugs for
11 the manufacturers that are listed here that
12 may not have been subject to that -- to the
13 scheme.

14 Q. Well, would the comparable drugs that we're
15 talking about have to be drugs that are
16 subject to patent protection and do not
17 compete with drugs that are part of the
18 alleged scheme?

19 A. You will notice that I've identified
20 yardsticks for single-source branded drugs.
21 I have identified yardsticks for multi-
22 source branded drugs and for physician

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1 administered drugs and for generic drugs and
2 so that whatever specific drugs I can find
3 that will help inform the survey information
4 that -- substantial survey information
5 that's already done would be looking at
6 drugs that would fit into those categories
7 and face the kinds of competition that
8 patented -- you're asking about patented
9 drugs -- that patented therapeutic
10 substitutes would face within a particular
11 type of disease management regime.

12 Q. Yeah, but I'm talking about for the period
13 of time, that is, the class period of this
14 case --

15 A. Uh-huh.

16 Q. -- and I'm talking about drugs that you say
17 would be unaffected by the alleged scheme --

18 A. That I would say --

19 Q. -- that you say you would use as a basis for
20 developing yardsticks. Are you with me so
21 far?

22 A. It's not that I would say, that it would be

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1 Q. The first Complaint was filed I think in
2 around October 2001.

3 (Pause.)

4 (The witness viewing Hartman
5 Exhibit No. 002.)

6 A. Looking for data of one of the fast track
7 defendants' drugs in table 3A, Vepesid,
8 conditioned on the types of issues that we
9 talked about yesterday about identifying
10 the portion that was sold to hospitals,
11 et cetera, it is still the case that the
12 spreads were well above the yardstick
13 spreads through the end of 2002, and so I
14 would look to the spreads. They're
15 relative to quarter 2 of 2000, quarter 1
16 -- quarter 3 of 2001, they have declined
17 some. On average, they have declined some
18 from '98 and '99. But they have by no
19 means achieved a level that would say that
20 the -- that these overcharges on this
21 inflation has been squeezed out of the
22 system.

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1 Q. Do you plan to use post Complaint spreads
2 as a benchmark in this case?

3 A. I would not think so.

4 Q. Why not?

5 A. Because the filing of the Complaint -- I
6 have seen -- if I see evidence the filing
7 of the Complaint led to a dissipation or
8 elimination of the AWP inflation scheme
9 that may qualify my answer, but I have
10 seen no evidence to that to date nor have
11 I been directed by counsel to make any
12 such assumption.

13 Q. Well, if the spreads during the class
14 period were the same as the spreads during
15 a nonfraudulent benchmark period, what
16 conclusion would you draw from that?

17 A. If the spreads were the same during --
18 from 1991, say, through 2000, relative to
19 1984 through 1990, if they were the same,
20 I would draw a conclusion that the scheme,
21 while impacting the AWPs, had little or no
22 -- caused little or no economic injury.

413

1 Q. Are you saying that you are only going to
2 use the period prior to the class period
3 for benchmarking purposes?

4 MR. SOBOL: Objection.

5 Q. You are not going to use the period after
6 the class period?

7 MR. SOBOL: Objection. Asked
8 and answered.

9 A. I have been directed by counsel in
10 paragraph 6 to assume -- the three class
11 periods are so identified.

12 I am sorry. Did I say three
13 class periods?

14 The three classes are so
15 identified. And the class period is
16 identified as January 1991 to the present.
17 And that's what I'm -- that's what I'm
18 taking.

19 Q. So it is your testimony as an economist
20 that the fraud continued even after the
21 Complaint was filed?

22 MR. SOBOL: Objection.

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1 from the sticker price is, well, it must
2 be close to \$18,000. In that case, it is
3 a sucker price. It is not a sticker
4 price. And what is happening here is you
5 need to know that information.

6 And what I am saying is these
7 people don't know that information. If
8 they did know that information, and if I
9 knew that information negotiating a price,
10 I would be able to use it to get a better
11 reduction off of AWP for the drugs.

12 When I am filling out the
13 percentage -- when I am filling in this
14 client proposal here, and I know what the
15 ASP is, I'm going to say, "13 percent?
16 Give me a break. I want 60 percent off of
17 that AWP."

18 MR. SOBOL: May the record
19 reflect the exhibit you were referring to.

20 THE WITNESS: I was referring to
21 page 2067 of the ESI Pharmacy Benefit
22 Program Pricing Proposal for client X date

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1 X, Bates numbered range ESI 27700002066 to
2 2077.

3 BY MR. EDWARDS:

4 Q. You say that one of the things that you're
5 going to do is you're going to compare
6 discounts below AWP that were negotiated
7 during time periods that were affected by
8 the alleged fraud with discounts below AWP
9 that were negotiated during time periods
10 not affected by the alleged fraud? Fair?

11 MR. SOBOL: Objection. Asked
12 and answered.

13 A. It is unfair. I'm going to compare
14 relationships between AWP and ASP, which
15 is a sum of all price offsets prior to the
16 alleged fraud and compare those that
17 actually occurred during the fraud to
18 those that either occurred prior to or
19 occurred during the period of the alleged
20 scheme but were drugs manufactured by
21 nondefendants or were drugs manufactured
22 by defendants that lawyers -- that counsel

502

1 indicates to me were not subject to the
2 scheme.

3 Q. You say you are going to compare what
4 happened during periods affected by the
5 alleged fraud to what happened during
6 periods that were not affected by the
7 alleged fraud?

8 A. I'm --

9 Q. Is that fair?

10 A. What is fair to say is I'm going to
11 compare spreads and what happened to
12 pricing during the periods of alleged
13 fraud to yardsticks for what would have
14 happened during the alleged fraudulent
15 period absent the AWP scheme.

16 Q. And what would your conclusion be if in
17 comparing those two time periods you came
18 across a particular drug for which the AWP
19 was identical and the discount below AWP
20 in the contract was identical?

21 A. So you are -- to understand the question
22 right now, the -- as I have looked at --

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1 and we're talking about contracts. I'm
2 not sure which contract we are talking
3 about. PBM contracts with third-party
4 payers?

5 Q. We can talk about PBM contracts. Just to
6 simplify it, period A is the fraud period.
7 Period B is the nonfraud period. And
8 let's say we have got an AWP for a
9 particular drug of \$100.

10 A. And when you say AWP for a particular
11 drug, you mean an NDC for that drug?

12 Q. Sure. An NDC for that drug with a
13 reported AWP of \$100 and in both cases the
14 contract with the PBM calls for
15 reimbursement at AWP minus 15 percent.
16 What conclusion would you draw from that
17 scenario?

18 A. So to be, perfectly understand what you're
19 asking, I'm looking at an actual spread,
20 and from -- and that -- and in that actual
21 spread involves both an AWP and an ASP,
22 and I go to my yardstick, which is a

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1 relationship of the but-for AWP to that
2 ASP, both the same ASP, for that NDC of
3 that manufacturer, and so that the but-for
4 is from period B; the actual is from
5 period A, as you are saying the fraud, the
6 subject of the fraud; and for that
7 particular NDC, do we want to say in a
8 particular year, in a particular quarter,
9 or for the --

10 Two things. If it turns out
11 that the AWP is not inflated relative to
12 what the but-for relationship should be,
13 then the impact, the injury, and the
14 damages -- not the impact -- the injury
15 and damages flowing from the scheme for
16 that NDC for that -- for that contract
17 would be zero.

18 However, I have seen -- the
19 second important point is I have not seen
20 -- I certainly haven't looked at all the
21 contracts, but I have seen no contract to
22 date where the AWP in the spread is broken

505

1 out by NDC. It is just an aggregate over
2 everything and all types of drugs, and I
3 would need to take into account that fact.
4 I mean your hypothetical is not -- is
5 counter to the evidence to the way
6 contracts are written.

7 Q. Do you have any understanding of the
8 extent to which RFPs are used in
9 connection with the negotiation of
10 contracts between payers and PBMs?

11 A. I would assume that they -- if -- if they
12 weren't used, they should be used.

13 Q. And if they are used, does that have any
14 impact on your opinion?

15 MR. SOBOL: Objection.

16 A. We're talking about events that have
17 occurred over the past 15 years that have
18 led to my conclusion about the
19 corroboration of the allegations, and all
20 of those negotiations in my understanding
21 were subject to RFP -- well, a lot of them
22 were subject to RFPs. Certainly large